

FSM SUPREME COURT TRIAL DIVISION

PACIFIC INTERNATIONAL, INC.,	)	CIVIL ACTION NO. 2014-046
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
THE NATIONAL GOVERNMENT OF THE	)	
FEDERATED STATES OF MICRONESIA, by	)	
and through its Agency, the FSM PROGRAM	)	
MANAGEMENT UNIT (PMU),	)	
	)	
Defendant.	)	
_____	)	

ORDER

Beauleen Carl-Worswick  
Associate Justice

Decided: October 12, 2015

APPEARANCES:

For the Plaintiff:	Marstella E. Jack, Esq. P.O. Box 2210 Kolonias, Pohnpei FM 96941
	Thomas McKee Tarpley, Esq. 414 West Soledad Avenue, Suite 904 Hagatna, Guam 96910
For the Defendant:	Aaron L. Warren, Esq. Clayton M. Lawrence, Esq. Assistant Attorneys General FSM Department of Justice P.O. Box PS-105 Palikir, Pohnpei FM 96941

\* \* \* \*

HEADNOTES

Civil Procedure – Summary Judgment – Procedure

In considering a summary judgment motion, the court must view the facts and inferences in a light most favorable to the party opposing the motion. Pacific Int'l, Inc. v. FSM, 20 FSM R. 220, 222 (Pon. 2015).

Civil Procedure – Summary Judgment – Grounds

A moving party is entitled to summary judgment when it has demonstrated that there are no

genuine issues of material fact remaining and that it is entitled to judgment as a matter of law. Pacific Int'l, Inc. v. FSM, 20 FSM R. 220, 222 (Pon. 2015).

Civil Procedure – Summary Judgment – Procedure

Once the movant presents a prima facie case of entitlement to summary judgment, the burden shifts to the non-moving party to produce some competent evidence that depicts a genuine issue of material fact remains to be resolved. Pacific Int'l, Inc. v. FSM, 20 FSM R. 220, 222 (Pon. 2015).

Settlement

In order for a settlement agreement to be binding, it must be definite and certain as to the terms and requirements, as well as identify the subject matter and spell out each party's essential commitments. Pacific Int'l, Inc. v. FSM, 20 FSM R. 220, 223 (Pon. 2015).

Public Contracts

The mandate of 55 F.S.M.C. 221(2) prohibits any employee of the FSM to authorize an expenditure or create or authorize an obligation in advance of the availability of funds. Pacific Int'l, Inc. v. FSM, 20 FSM R. 220, 223 (Pon. 2015).

Contracts – Interpretation; Settlement

A court should endeavor to determine the meaning of a contractor's words, rather than rely on what a signatory later says was intended. Pacific Int'l, Inc. v. FSM, 20 FSM R. 220, 223-24 (Pon. 2015).

Contracts – Conditions; Settlement

When the parties to a proposed contract have agreed that the contract is not to be effective or binding until certain conditions are performed or occur, no binding contract will arise until the conditions specified have occurred or been performed. Pacific Int'l, Inc. v. FSM, 20 FSM R. 220, 224 (Pon. 2015).

Settlement

A settlement agreement that was subject to the President's approval and Congress's appropriation of funds, was not enforceable when the President rejected it. Pacific Int'l, Inc. v. FSM, 20 FSM R. 220, 224 (Pon. 2015).

Arbitration

Even in the absence of a statute, courts generally favor arbitration and every reasonable presumption will be held to uphold arbitration proceedings. Pacific Int'l, Inc. v. FSM, 20 FSM R. 220, 224 (Pon. 2015).

Arbitration; Public Contracts

When the applicable regulations require that any public contracts awarded under those regulations are subject to mandatory alternative dispute methods; when the movants have filed a complaint and thereby "invoked the litigation machinery"; when the parties availed themselves of an alternative dispute method by virtue of a mediation session but the settlement agreement thus reached was unenforceable because it did not receive the required Presidential approval; and when the government is not disposed to resume alternative dispute resolution, the plaintiff's motion to compel arbitration will be denied. Pacific Int'l, Inc. v. FSM, 20 FSM R. 220, 224-25 (Pon. 2015).

COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

On August 5, 2015, a Motion for Partial Summary Judgment to Enforce [the] Settlement Agreement and to Compel Arbitration was filed by the Plaintiff, Pacific International Inc. (hereinafter referred to as "PII"). In the wake of a Motion for [an] Enlargement, which was duly granted, the Defendant, FSM (hereinafter referred to as "Government") filed an Opposition thereto, on August 26, 2015.

I. STANDARDS FOR SUMMARY JUDGMENT

In considering a summary judgment motion, the Court must view the facts and inferences in a light most favorable to the party opposing the motion. FSM Civ. R. 56(c); Carlos Etscheit Soap Co. v. McVey, 17 FSM R. 427, 434-35 (App. 2011). A moving party is entitled to summary judgment when it has demonstrated that there are no genuine issues of material fact remaining and that it is entitled to Judgment as a matter of law. Peniknos v. Nakasone, 18 FSM R. 470, 478 (Pon. 2011). Once the movant presents a prima facie case of entitlement to summary judgment, the burden shifts to the non-moving party to produce some competent evidence that depicts a genuine issue of material fact remains to be resolved. FSM v. GMP Hawaii, Inc., 17 FSM R. 555, 570 (Pon. 2011).

II. FACTUAL AND PROCEDURAL SYNOPSIS

On June 3, 2015, both sides participated in a day-long mediation session, which constituted an alternative to the prospect of protracted litigation and in doing so, they endeavored to reach a mutually acceptable resolution of the instant cause of action in an amicable fashion. The attendees for the Government at the congregation included Assistant Attorney General Aaron L. Warren, David Lechner, Esq. and the Contracting Officer with the PMU, Bruce Howell. The assigned mediator at this joint session was Antonio Piazza.

Prior to convening the subject mediation, a memorandum dated March 13, 2015, was directed to the attention of this mediator from the FSM Secretary of the Department of Justice, April Dawn M. Skilling. The caption on the memorandum referenced a "Confirmation of Settlement Authority in [the] Dispute between Pacific International Inc. v. FSM/PMU – Weno, Chuuk Road Project Mediation." This document provided, *inter alia*: "I have assigned Assistant Attorney General Aaron L. Warren to represent my office at the mediation[,] with the understanding that he provide an immediate briefing to me of any proposed settlement[,] that I will then relay to the President for his consideration and approval. Upon the President's approval, on behalf of the FSM, I may formally enter [into] any settlement agreement."

The negotiations conducted at the mediation yielded an agreement, which spoke to partial settlement of the case and controversy in issue. The relevant clauses of this June 3rd settlement agreement, in terms of PII's filing which seeks partial summary judgment, set forth: "1. [The] FSM agrees to make a payment of \$2,000,000 to PII[,] subject to the approval by the President of the FSM within fourteen (14) days and appropriation of funds by the Congress of the FSM. 2. [The] FSM agrees to make payment to PII within 30 days[,] following appropriation of funds by [the] FSM Congress."

On July 1, 2015 a Status Conference was held before this Court, at which, Assistant Attorney General Leonito M. Bacalando Jr. appeared on behalf of the Government and Attorney Marstella E. Jack represented PII. Both parties acknowledged that a settlement agreement had been generated in the

wake of negotiations at the June 3rd mediation. The Government represented that the President-elect needed to consult with Congress, given the large sum of money involved and as such, requested a continuance.

Pll maintained that the Court possessed the authority to enforce the settlement agreement and questioned why the President's countenance of same was necessary, since the Secretary of Justice had authorized Assistant Attorney Warren to execute the subject agreement, on behalf of the Government; hence it was binding and enforceable. The Government countered, that the settlement agreement was contingent upon both the President's approval, along with a commitment of monies from Congress and therefore, not enforceable at that juncture. Both sides then agreed to continue this matter for two (2) weeks, which would enable the Government to communicate with the new President.

On July 15, 2015, the same Counsel appeared before the Court on behalf of their respective clients at a Status Conference. The Government apprized this Court that contact had yet to be made with the President, in order to discuss the instant matter and as a result, sought another continuance. Pll objected to this request and once again, asked that the settlement agreement be enforced.

Pll then advised the Court of its intention to file a relevant motion in support of the oral request to enforce the settlement agreement. As noted above, Pll filed the present Motion on August 5, 2015 and the Government's Response in Opposition followed on August 26, 2015. Finally, it bears noting, that an Affidavit from the Secretary of Justice, which was affixed to the Government's Opposition, denoted: "The President has not approved any provision found within the signed June 3, 2015 agreement [and] has rejected [it] as a whole."

### III. ANALYSIS

#### A. *Enforcement of the Settlement Agreement*

In issue is whether there exists a genuine issue of material fact, concerning the compelled implementation of the subject settlement agreement and thereby, the concomitant payment of a sum certain to Pll from the Government. Pll's coveted enforcement of the settlement agreement is predicated on a claim that the authority imbued within Assistant Attorney General Warren, to act on behalf of the Government during the joint mediation (which constituted the genesis of this settlement agreement), should be dispositive, given an agency relationship which bound the Government to the terms and conditions contained in the subject document.

In order for an agreement to be binding, it must be definite and certain, as to the terms and requirements, as well as identify the subject matter and spell out the essential commitments of each party. DJ Store v. Joe, 14 FSM R. 83, 85 (Kos. S. Ct. Tr. 2006). As previously noted, the settlement agreement clearly set forth, that the imprimatur of the President was necessary, along with an appropriation of respective funds by Congress, in order to underwrite the contemplated partial settlement. Despite the Pll's averments sounding in principal/agency, these conditions, delineated within the provisional settlement agreement, comport with the mandate of 55 F.S.M.C. 221(2), which prohibits any employee of the FSM to authorize an expenditure or create/authorize an obligation in advance of the availability of funds. See Fritz v. FSM, 16 FSM R. 192, 195 (App. 2008); Engichy v. FSM, 15 FSM R. 546, 551 (App. 2008).

The intentions of the two sides were reduced to writing and embodied within the settlement agreement and the language employed was both plain, as well as unambiguous, in terms of a recognition that these two events would need to occur, before the agreement became effective or binding. As noted in FSM v. GMP Hawaii Inc., 17 FSM R. 555, 571 (Pon. 2011), a Court should

endeavor to determine the meaning of the contractor's words, rather than rely on what a signatory later says was intended.

At the expense of repetition, the first and second clauses of the settlement agreement in issue prefaced payment of the subject monies by the Government to PII "1) . . . subject to the approval of the President of the FSM and appropriation of funds by the Congress of [the] FSM" and "2) . . . following appropriation of funds by [the] FSM Congress." These contingencies were clearly identified and definite. In Etscheid v. Adams, 6 FSM R. 365, 388 (Pon. 1994), the Court found: "Where the parties to a proposed contract have agreed that the contract is not to be effective or binding until certain conditions are performed or occur, no binding contract will arise until the conditions specified have occurred or been performed."

In addition, implicit within a June 5, 2015 missive that had been forwarded to the FSM President from the mediator, recommending the former's confirmation of the settlement agreement, was an acknowledgment that the President's approval of same was necessary before it could be finalized. As previously noted, an affidavit attached to the Government's Opposition, reflected the President's rejection of the settlement agreement. As a result, the provisions delineated within the settlement agreement have not been met; hence it is non-binding and *a fortiori* unenforceable.

In the present case, this Court is of the opinion that PII has not met its burden of proof, in terms of establishing a prima facie case of entitlement to partial summary judgment, which seeks to enforce the settlement agreement. The Court further notes the Government has adduced competent evidence in opposition to PII's motion for partial summary judgment seeking to enforce the settlement agreement.

Accordingly, Plaintiff's Motion for Partial Summary Judgment to Enforce [the] Settlement Agreement is hereby DENIED.

#### B. *Compelling Arbitration*

This Court has previously recognized, that the Regulations for Infrastructure Development Plan Contracts (IDP Regulations), which apply to the contract in issue, were promulgated under the authority of 55 F.S.M.C. 419 and 17 F.S.M.C. 101 *et seq.* Furthermore, IDP Regulation 5.5 sets forth: "Disputes between the owner and any contractor arising under any contracts awarded pursuant to these regulations shall be subject to mandatory alternative dispute methods . . . ." Finally, E.M. Chen & Associates (FSM) Inc. v. Pohnpei Port Authority, 10 FSM R. 400, 408 (Pon. 2001), held that the prevailing modern view of arbitration is that, even in the absence of a statute, Courts generally favor arbitration and every reasonable presumption will be held to uphold arbitration proceedings.

Although PII additionally requests that arbitration be compelled, the concomitant argument in support thereof, merely broaches agency principles. The parties availed themselves of an alternative dispute method, by virtue of the June 3rd mediation session and as adequately set forth above, the conditions articulated within the subject settlement agreement that was generated during this caucus did not occur, rendering same unenforceable.

IDP Regulation 5.5(G) states: "In the event of an unresolved mediation of a disputed matter, the claimant may proceed with a civil litigation in the FSM Supreme Court under the regulations and laws of the FSM." Further, IDP Regulation 5.6 sets forth: "Any and all contract disputes under these regulations[,] that could or should be litigated[,] shall proceed to finality according to subpart 5.5 prior to bringing a civil litigation action in the Court."

Despite having filed the instant Complaint on December 16, 2014, and thereby having "invoked

the litigation machinery," E.M. Chen & Assocs. (FSM) Inc., 10 FSM R. at 407, coupled with the fact that PII laments the financial cost attendant to the aforementioned negotiations, it simultaneously seeks to compel the Government to participate in further arbitration efforts. In short, the parties have earnestly undertaken steps in this vein, however the conditions set forth in their ensuing provisional settlement agreement were not triggered and as such, the "litigation machinery" continues to churn. Although the Court is hopeful that continuing negotiations by and between the parties bear fruit, it is not prone to directing the Government to resume alternative dispute resolution, if in fact, it is not predisposed to do so.

As a result, the Plaintiff's Motion to Compel [Continuing] Arbitration is hereby DENIED. In addition, this Court's March 4, 2015 Order to Stay Litigation Pending Mediation is hereby set aside and therefore Defendant is Ordered to file an Answer or otherwise respond to the instant Complaint within twenty (20) days from the entry of this Order, as per Rule 12(a) of the FSM Rules of Civil Procedure.

\* \* \* \*

FSM SUPREME COURT TRIAL DIVISION

FSM DEVELOPMENT BANK,	)	CIVIL ACTION NO. 2007-1008
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CHRISTOPHER CORPORATION, PATRICIA	)	
(PEGGY) SETIK, MARIANNE B. SETIK, THE	)	
ESTATE OF MANNEY SETIK, ATANASIO SETIK,	)	
VICKY SETIK IRONS, IRENE SETIK WALTER,	)	
MARLEEN SETIK, JUNIOR SETIK, ELEANOR	)	
SETIK SOS, JOANITA SETIK PANGELINAN,	)	
MERIAM SETIK SIGRAH, CHRISTOPHER JAMES	)	
SETIK, GEORGE SETIK, individually and d.b.a.	)	
CHRISTOPHER STORE,	)	
	)	
Defendants.	)	
	)	

ORDER

Lourdes F. Materne\*  
Temporary Justice

Decided: October 15, 2015

\*Associate Justice, Palau Supreme Court, Koror, Palau

APPEARANCES:

For the Plaintiff: Nora E. Sigras, Esq.  
P.O. Box M  
Kolonias, Pohnpei FM 96941